tive holdings involve fact-bound and primarily state-law issues, they are not themselves worthy of review, and their presence thus constitutes a compelling reason not to take this case to address the waiver issue (even if that issue itself merited review, which, as explained above, it does not).

III. The Court of Appeals' Application of State-Law Contract Principles Does Not Reflect "Hostility" to Arbitration or Otherwise Present Any Issue Meriting This Court's Attention.

Recognizing that the Sixth Circuit's alternative bases for not enforcing the arbitration agreement all rested on state-law grounds, Ryan's attempts to repackage them as a federal issue by asserting that together they reflect "hostility" to arbitration in violation of Section 2 of the FAA and the principles of such decisions as *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Ultimately, however, the only evidence of "hostility" that Ryan's musters is that the Sixth Circuit supposedly erred in applying principles of Tennessee contract law. *See* Pet. 13-16. Such claimed errors in the application of state law to particular facts are exactly the types of matters this Court does not sit to review, and the assertion that they were motivated by judicial "hostility" does not transform them into certworthy issues.

Other than the supposed errors in application of state law in this particular case, there is no basis for any suggestion that the Sixth Circuit is somehow out of step with the principles established by this Court's case law or that of other circuits. The courts are in broad agreement that (assuming its applicability for the sake of argument) Section 2 of the FAA supersedes state-law principles that would render arbitration agreements generally unenforceable. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-72 (1995). Nonetheless, whether any particular agreement to arbitrate is valid and enforceable remains an issue determined by generally applicable state contract-law principles. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). In other

words, the FAA is intended to make arbitration agreements to which it applies "as enforceable as other contracts" under state law, "but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12 (1967).

Thus, this Court has held that courts may not "invalidate arbitration agreements under state laws applicable only to arbitration provisions," nor may state law discriminate against arbitration clauses or otherwise place them on an "unequal footing" with other contractual provisions. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Otherwise, however, "state law may be applied 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,'" and thus "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.* at 686-87 (citation omitted).

Nothing in the Sixth Circuit's opinion in this case or other cases suggests that it has disregarded these principles. True to such principles, the Sixth Circuit's leading cases on arbitration emphasize the federal policy favoring arbitration and the need to avoid judicial hostility to arbitration agreements. *See, e.g., Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 652-53 (6th Cir. 2003) (en banc) (citing the "liberal federal policy favoring arbitration agreements," and recognizing that the Supreme Court "has repeatedly 'rejected generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law'"). Indeed, the Sixth Circuit has not hesitated to reverse district court rulings that it perceives as reflecting hostility to or discrimination against arbitration

agreements. *See Cooper v. MRM Investment Co.*, 367 F.3d 493, 508-09 (6th Cir. 2004).[3]

The occasional judicial invalidation of, or refusal to enforce, an arbitration agreement through the application of state law contract principles merely reflects a basic attribute of Section 2 — that arbitration agreements may be held unenforceable based on generally applicable contract principles — and thus cannot itself demonstrate "hostility" to arbitration. Indeed, the cases cited by Ryan's prove the point. Ryan's emphasizes that what it considers to be the proper approach to arbitration agreements is exemplified by the rulings of the United States Court of Appeals for the Seventh Circuit. *See* Pet. 12-13 (citing *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999); *Oblix, Inc. v. Winiecki*, 374 F.3d 488 (7th Cir. 2004)).

What Ryan's does not tell the Court is that the Seventh Circuit — the very court whose approach to arbitration agreements Ryan's supposedly endorses — has itself held the Ryan's arbitration clause unenforceable for one of the same reasons relied on by the Sixth Circuit below: lack of consideration. In *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001), the Seventh Circuit struck down the Ryan's agreement because it found that "the arbitration agreement between EDS and Penn contains only an unascertainable, illusory promise on the part of EDS," *id.* at 759, and that Ryan's acceptance of applications for employment from job-seekers could not itself constitute consideration for the agreement, *id.* at 760 — findings identical to the conclusions of the Sixth Circuit in this case. Indeed, the Seventh Circuit

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[3] In *Cooper*, the Sixth Circuit chided a district court for having "expressed hostility to the arbitration of employment discrimination claims" and for having "indulged its belief that employers should not be allowed to require arbitration of statutory discrimination claims" — a belief the court of appeals found "incompatible with the strong congressional policy favoring arbitration." *Id.*

expressly endorsed the Sixth Circuit's previous decision striking down the Ryan's arbitration clauses for lack of consideration in *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000).

The Seventh Circuit's decision in *Penn* demonstrates the fallacy of Ryan's contention that one can infer forbidden hostility to arbitration merely from a court's refusal to enforce a particular arbitration clause. As *Penn* shows, even a court that is friendly to arbitration and whose general approach to arbitration agreements Ryan's fully endorses may legitimately balk when confronted with an agreement that, like the Ryan's agreement, "carries a good joke too far."[4]

Moreover, Ryan's arguments fail to recognize that the application of state law to defeat an arbitration agreement is only problematic under the FAA if it treats arbitration clauses differently or less favorably than other types of contractual provisions. *See Doctor's Associates*, 517 U.S. at 686-87. But even while contending, incessantly yet unconvincingly, that the Sixth Circuit misapplied various principles of Tennessee contract law (*see* Pet. 13-16), and asserting that the court did so "discriminatorily" (Pet. 13), Ryan's identifies nothing in the reasoning of the court that treated the agreement at issue here differently *because it was an arbitration agreement.* Absent a showing that the principles applied by the Sixth Circuit discriminated against arbitration clauses specifically, Ryan's arguments reduce to nothing more than assertions that the Sixth Circuit erred in applying garden-variety Tennessee contract law — assertions that would not justify review by this Court even if they were not convincingly refuted by the Sixth Circuit's careful explanation of the state-law bases for its holding.

Finally, Ryan's hyperbolic assertions that, under the Sixth Circuit's approach, "no contract would ever be en-

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[4] *Cf. Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948).

forceable if presented by a large corporation to an individual of limited education and means" (Pet. 15) are flatly contradicted by Sixth Circuit case law. The Sixth Circuit has regularly enforced arbitration agreements even where there is disparity in bargaining power, so long as their terms are not substantively unconscionable. *See Morrison*, 317 F.3d 646; *Cooper*, 367 F.3d at 500-02. Moreover, in the only two decisions in which the Sixth Circuit has so far cited its opinion in this case, the court has declined to hold arbitration clauses unenforceable. *See Howell v. Rivergate Toyota, Inc.*, 2005 WL 1736582 (6th Cir. July 25, 2005); *Pennington v. Frisch's Restaurants, Inc.*, 2005 WL 1432759 (6th Cir. June 17, 2005). And the court's most recent published opinion concerning arbitration of employment claims, *Scovill v. WSYX/ABC*, __ F.3d __, 2005 WL 2454626 (6th Cir. Oct. 6, 2005), similarly enforces an arbitration agreement against an employee (albeit while severing one unconscionable part of the agreement).

In sum, nothing about the decision in this case or the Sixth Circuit's more general jurisprudence suggests a court that is either hostile to arbitration or out of step with either this Court's arbitration case law or that of other circuits.

IV. The Court of Appeals' Choice of Law Analysis Is Correct and Does Not Reflect a Conflict Among the Circuits on Any Issue of Federal Law.

Ryan's begins its discussion of choice of law by misstating the Sixth Circuit's holding. Ryan's asserts that, "by necessary implication," the Sixth Circuit held that Tennessee law applied to "every single Ryan's employee residing in the twenty-two (22) other states where Ryan's does business." Pet. 17. The Sixth Circuit, however, held no such thing. Its holding applies only to the named plaintiffs (all Tennessee residents) and the 18 other individuals who opted in to this action. The court held that Ryan's had failed to demonstrate that there was a conflict of laws involving the states of residence of those 18 individuals, not that Tennessee law would

apply regardless of what state the plaintiffs hailed from. *See Walker*, 400 F.3d at 377 (framing the issue as whether the district court erred in applying Tennessee law to Ryan's "motion to compel arbitration with respect to *these opt-in plaintiffs*") (emphasis added).

Continuing its mischaracterization of the court of appeals' holding, Ryan's contends that the Sixth Circuit's ruling "violated Tennessee's general adherence to the doctrine of *lex loci contractus*." Pet. 17. Leaving aside that a mere alleged error in applying state choice of law rules is not in itself a ground for review by this Court, Ryan's claim that the Sixth Circuit ignored Tennessee law on this point is flatly wrong. The court in fact *began* with the proposition that "Tennessee law applied when analyzing the enforceability of the three named Plaintiffs' Arbitration Agreements *because the agreements were executed in Tennessee* and substantially performed in that state." *Walker*, 400 F.3d at 377 (emphasis added).

The court went on to apply the same law to the opt-in plaintiffs not because of a sudden change of heart on the applicability of *lex loci contractus*, but as a result of the application of another well-settled, black-letter principle of law: No choice of law issue is presented if the law of the forum state "is not in conflict with that of any other jurisdiction connected to this suit." *Id.* at 377 (quoting *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985)). Tennessee, in common with most other jurisdictions, adheres to this principle. *See Hataway v. McKinley*, 830 S.W.2d 53, 55 (Tenn. 1992) (stating that in determining a choice of law issue, "[t]he first issue we address ... is whether there is a conflict" of laws); *see also Wayland v. Peters*, 1997 WL 776338, at *1 (Tenn. App. Dec. 17, 1997) ("As a preliminary issue to deciding which state law applies, it must be determined whether an actual conflict of law exists.").

Without attempting to show that there is a conflict between Tennessee law and that of any state where any particu-

lar opt-in plaintiff resides (and suggesting, moreover, that it was incumbent on both the District Court and the Sixth Circuit, not Ryan's, to ferret out such a conflict; *see* Pet. 18), Ryan's asserts that a conflict of laws must exist because the Eighth and Eleventh Circuits and various trial-level state and federal courts have reached different decisions about whether to enforce Ryan's arbitration agreements. *See* Pet. 18-19. Ryan's argument, however, fails to come to grips with the Sixth Circuit's holding that different results when common legal principles are applied to a particular set of facts "do not establish a material conflict in basic contract principles among the states." *Walker*, 400 F.3d at 378. Ryan's does not point to any precedents contradicting the Sixth Circuit on this point. Nor does it even attempt to identify any underlying conflicts in *principle* between the laws of potentially relevant states; it merely rests on the differences in outcome, which are insufficient to demonstrate a true conflict of laws. *See* Pet. 20-21. As this Court has recognized, state contract law is "is not at its core 'diverse, nonuniform, and confusing,'" *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 n.8 (1995), and Ryan's offers no reason why this Court should second-guess the Sixth Circuit's conclusion that any differences among lower courts in other jurisdictions do not reflect real conflicts of law.[5]

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[5] In any case, determining whether the differences in outcomes of the primarily trial-level cases Ryan's cites reflect true conflicts of law among relevant jurisdictions or merely the inevitable differences in application of the same legal principles that result from the great number of individual courts and judges in this country would involve an inquiry unsuitable for this Court's limited time and resources. *See, e.g., Shutts*, 472 U.S. at 816 (leaving it to lower court to determine whether conflicts were genuine). Moreover, we do not concede that if there were a genuine conflict of laws (or a conflict were to develop if more plaintiffs were to sign on), it would necessarily violate *Shutts* to apply Tennessee law in light of Ryan's relationship to the state and Tennessee's interest in application of its law. In light of the Sixth Circuit's ruling and the current posture of the case, however, that issue is not now presented.

Ryan's reliance on a supposed "split among the Circuits concerning the enforceability of Ryan's arbitration agreement" adds nothing to its choice of law arguments. This Court uses its certiorari jurisdiction to resolve conflicts among the circuits over "important federal question[s]," S. Ct. R. 10(a), not over the application of state law to particular contracts. Indeed, because it does not have ultimate authority over state law, this Court cannot definitively resolve such conflicts.

The supposed "conflict," in any event, is illusory. In *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943 (8th Cir. 2001), the Eighth Circuit not only was applying Missouri law, but it did not even address the same types of issues as the Sixth Circuit in this case. The principal issue in *Lyster* was whether the arbitration agreement applied by its terms to EEOC matters, *see id.* at 946-47, a question of contract interpretation not presented by this case. After resolving that issue, the Eighth Circuit briefly addressed and rejected the argument that the agreement was unconscionable because it imposed unreasonable arbitration fees on the employee. *Id.* at 947.[6] The Eighth Circuit nowhere addressed the issues that were decisive in this case: lack of consideration and mutual assent, and employment of a structurally flawed arbitration system that did not permit effective vindication of the employees' underlying substantive rights. Decisions addressing different issues under the laws of different states hardly reflect a circuit-split.

Ryan's reliance on *Hudson v. Ryan's Family Steak Houses, Inc.*, 212 F.3d 601 (11th Cir. 2000) (table), is weaker yet. That decision is unpublished and, under the rules of the Eleventh Circuit, is not considered a binding precedent. Moreover, unlike many unpublished opinions, its text is not

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[6] By contrast, the Sixth Circuit in this case found that it did not have to reach the question of unconscionability under state law. *See Walker*, 400 F.3d at 385.

even available on Westlaw. The existence of the decision does not establish a conflict with the Sixth Circuit, or any other circuit, over any issue, whether of federal or state law.

Ultimately, Ryan's fundamental complaint appears to be that the Sixth Circuit's decision makes "the enforceability of the Ryan's arbitration program depend[ent] solely on geography." Pet. 19. But the possibility of outcomes being dependent on geography is an inevitable consequence of a system in which the enforceability of agreements to arbitrate depends, as this Court has repeatedly held it does, on state contract law. Indeed, Ryan's plea for national uniformity contradicts its own contention that the Sixth Circuit erred in applying Tennessee law to opt-in plaintiffs residing outside Tennessee. Ryan's attack on the "arbitrar[iness]" of a system that permits divergent results in different jurisdictions (Pet. 19) reveals that its real problem with the decision below is not that the court applied the same law to all the plaintiffs, but that Ryan's thinks the court got the result wrong. In short, Ryan's wants a uniform national ruling that its agreements are enforceable — but its own recognition that it is "well-established" that state law governs the enforceability of arbitration agreements (Pet. 8) demonstrates that it is not entitled to such a uniform nationwide rule.

V. The Court of Appeals' Holding That Ryan's Structurally Flawed Arbitration System Is Unenforceable Presents No Issue Meriting Review by This Court.

Ryan's ends by contending that the Sixth Circuit erred in holding that "EDSI's arbitral forum is not neutral and, therefore, the agreements are unenforceable." *Walker*, 400 F.3d at 385-86. Again, the court's holding in this respect was an alternative ground for its decision and need not be reached in light of the court's decision that the agreements are unenforceable on state contract-law grounds. Even if the Sixth Circuit's analysis of EDSI's lack of neutrality were the sole ground for its decision, however, certiorari would be unwarranted.

Ryan's contends that the Sixth Circuit's decision conflicts with decisions of this Court holding that a court should not refuse to enforce an arbitration agreement because of "speculation" about its inadequacy, and with decisions of other lower federal courts holding that challenges to the impartiality of a particular arbitrator or arbitral panel under Section 10(a)(2) of the FAA, 9 U.S.C. § 10(a)(2), should be made through a post-arbitration application to vacate the award. *See* Pet. 22-24.

Although the general principle that post-arbitration review is adequate to weed out the occasional problem of a biased arbitrator is widely accepted, the courts have also recognized that there are circumstances in which the system of arbitration created by a particular agreement is so unfair that it is appropriate to excuse a party from participating in the process. As the Fourth Circuit explained in *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (Wilkinson, J.), "[g]enerally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance," and "[o]nly after arbitration may a party then raise such challenges if they meet the narrow grounds set out in 9 U.S.C. § 10 for vacating an arbitral award." *Id.* at 941. However, where one party has "so skewed the process in its favor" that the other "has been denied arbitration in any meaningful sense of the word," a court may intervene to relieve the disadvantaged party of the obligation to take part in a process "that is crafted to ensure a biased decisionmaker." *Id.* at 941, 938; *accord, McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 & n.7 (6th Cir. 2004) (following *Hooters* and recognizing that although courts may not presume arbitral partiality and generally should review claims of bias after an arbitration has occurred, "procedural unfairness inherent in an arbitration agreement may be challenged before the arbitration").

Ryan's cites no precedents that reject the principle established in the *Hooters* and *McMullen* cases, permitting a pre-arbitration challenge to an arbitration agreement in the ex-

treme circumstances where the arbitration procedures are "so wholly one-sided as to present a stacked deck." *Hooters*, 173 F.3d at 940. Here, that is exactly what the Sixth Circuit found, based on multiple factors including the qualifications and manner of selection of arbitrators, the financial interrelationship between Ryan's and EDSI (in which Ryan's accounted for 42% of EDSI's annual revenues), and the extremely limited discovery permitted by the rules. That EDSI has chosen, in this Court, to file a brief supporting one of the two parties to the dispute for which it supposedly is to provide a neutral adjudication only underscores the suspect nature of the arbitral forum here.

Ryan's cites cases holding, on their own specific facts, that showings concerning a single one of these factors in isolation were not sufficient to render an arbitration system subject to attack. Pet. 25-26. None, however, addressed the combination of circumstances that the Sixth Circuit found here rendered the arbitral forum unfair and inadequate. Astonishingly, Ryan's also asserts that the Seventh Circuit in *Penn v. Ryan's Family Steak Houses*, 269 F.3d at 758, "ruled" that the supposed "procedural safeguards built into the EDSI system" "were in line with other arbitration systems which have passed constitutional muster." Pet. 27. That is not true. What the Seventh Circuit actually *ruled* was that "*we need not resolve whether the EDS system is so deeply flawed that it should be rejected on its face*," 269 F.3d at 758 (emphasis added), because the court concluded that the arbitration agreement was unenforceable on the ground that it "contains only an unascertainable, illusory promise on the part of EDS." *Id.* at 759.

Ryan's misrepresentation of the Seventh Circuit's decision in *Penn* underscores the hollowness of its claim that this case presents conflicts among the circuits requiring this Court's resolution. Rather, in its ruling on the bias inherent in the Ryan's arbitration procedure, as in its other holdings, the Sixth Circuit applied settled, widely-agreed-upon principles

to the unusual and fact-bound circumstances of this case and Ryan's unconventional arbitration agreements. This Court need not, and should not, delve into either the Sixth Circuit's assessment of the bias inherent in the Ryan's arbitration system or into the fact-specific applications of state law that serve as the basis for its alternative holdings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

RYAN'S FAMILY STEAK HOUSES, INC.,
Petitioner,

v.

ERRIC WALKER, on behalf of himself and all others similarly situated; STEVE RICKETTS, on behalf of himself and all others similarly situated; VICKIE ATCHLEY, on behalf of herself and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The Petitioner, Ryan's Family Steak Houses, Inc. (hereinafter "Ryan's"), respectfully submits the following reply brief in support of its petition for certiorari. For both the reasons that follow as well as those articulated in Ryan's petition, this Court should review the erroneous decision of the United States Court of Appeals for the Sixth Circuit.

In opposing review by this Court, the Respondents incredibly maintain for the first time that the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (hereinafter the "FAA"), does not apply to this dispute involving the validity of Petitioner's national arbitration program. Not only is this position legally incorrect, it sharply conflicts with the position taken below by the Respondents before the district court and the Sixth Circuit.

Respondents additionally argue that no split among the circuits exists with respect to the heightened "knowing and voluntary" waiver standard used by the Sixth Circuit in ruling Respondents did not make an informed decision in agreeing to arbitration of their employment-related disputes with Ryan's. A demonstrable division among the circuits does indeed exist with respect to the propriety of applying this heightened standard. That split should be resolved by the Court.

Respondents' Eleventh Hour Assertion that the Federal Arbitration Act is Not Implicated By the Instant Petition is Wholly Inconsistent with the Position Taken Below.

In opposing review by this Court, the Respondents for the first time argue that the FAA does not apply. The Respondents never took this position before the district court

or the Sixth Circuit. In fact, the Respondent relied on the FAA in opposing arbitration at the district court level:

> The FAA provides that arbitration clauses are not enforceable if they are invalid under state common law. *See* 9 U.S.C. § 2.
>
> * * *
>
> Ryan's suggests that federal law favors arbitration, but that is *only* true in cases where a valid agreement exists. The FAA does not establish a presumption that a valid arbitration agreement exists – it only favors arbitration *after* that fact has been established. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 943-44 (1995) ('arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – if the parties have agreed to submit to arbitration.'). To apply the presumption of formation of an agreement to arbitration 'would permit the presumption to displace the fundamental rule that parties can be required to arbitrate only that if they have agreed to arbitrate.' *Hendrick v. Brown & Root, Inc.*, 500 F. Supp. 2d 527, 538 (E.D. Va. 1999). Indeed, the FAA provides that a federal court may order a party to arbitrate only 'upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.' 9 U.S.C. § 4.
>
> * * *
>
> The purpose of the Federal Arbitration Act (FAA) is to 'place arbitration agreements upon the same footing as other contracts.' *Gilmer v. Interstate/Johnson Lane*

> *Corp.*, 500 U.S. 20, 24 (1991). The FAA expressly provides that arbitration agreements may be challenged and invalidated on any generally applicable contract principle, stating that such contract 'shall be valid save upon any grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2.

(Pls.' Mem. in Supp. of Their Resp. In Opp'n to Def.'s Mot. to Dismiss and Pet. to Compel Arbitration and Stay Proceedings, and in Supp. of Pls.' Mot. for a Recession of the EDSI Arbitration Agreement and Pls.' Renewed Mot. for Ct.-Supervised Notice at pp. 3, 15, 41)

Similarly, in defending the district court's ruling before the Sixth Circuit, the Respondents again relied heavily on the FAA and federal case law promulgated thereunder. (Brief of Appellees/Resp'ts at pp. 19-24, 35). At no time did the Respondents take the position they now forward in an attempt to avoid review by this Court. The inconsistency could not be more clear.

The district court relied in part on the FAA and the federal case law decided thereunder in refusing to enforce the arbitration agreements at issue and the Respondents never took exception to that ruling before the Sixth Circuit. Respondents should now be barred at the outset from adopting their inconsistent position on the applicability of the FAA. *E.g., In re Charfoos*, 979 F.2d 390, 395 (6th Cir. 1992) ("[I]t is a long-standing principle of jurisprudence that an appellate court should not pass on issues not raised at the trial level."); *see also Singleton v. Wulff*, 428 U.S. 106, 119-20 (1976).

Respondents assert that the agreements at issue are outside the coverage of the FAA because the underlying contracts or transactions at issue arising out of the payment of wages involve the Respondents and Ryan's, not EDSI. According to the Respondents' brief in opposition, "Thus, to the extent the employees' contracts with EDSI purport to require them to arbitrate the controversy with Ryan's, those contracts are not within the scope of Section 2 of the FAA, because the 'controversy' is not one 'arising out of such contract or transaction' – *i.e.*, the contract or transaction between the employees and EDSI." (Resp'ts' Br. in Opp'n. at p. 4).

Respondents are essentially arguing that their dispute is not with EDSI and, therefore, they are not required to arbitrate because there is no controversy arising out of their agreement with EDSI. The fatally flawed logic of this argument is exposed when viewed in light of this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1990). In *Gilmer*, the arbitration agreement at issue was between the stockbroker and the securities exchange, not the stockbroker and his employer. *See Gilmer*, 500 U.S. at 23-25. Nevertheless, this Court compelled arbitration of the employee's age discrimination claim against his employer. *See id. see also Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1188 (9th Cir. 1986) (employees of brokerage firm may be entitled to the rights and privileges of an agreement between the firm and its customers although the employee themselves are not parties to the agreement); *Nesslage v. York Sec., Inc.*, 823 F.2d 231, 233 (8th Cir. 1987). Under Respondents' reasoning, this Court in *Gilmer* would have never reached the issue of whether federal statutory claims are appropriately referred to arbitration because there would have been no controversy between the Plaintiff and the exchange subject to arbitration. Indeed, the security industry's entire

arbitral scheme would be instantly invalidated if Respondents were correct.

In addition, Respondents completely ignore the fact that Ryan's *is expressly stated* to be a third-party beneficiary of the arbitration agreement between the Respondents and EDSI. The Respondents' argument further flies in the face of the fact that the FAA Section 2 "involving commerce" language has breadth equal to Congress's power to regulate under the Commerce Clause. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 n.7 (1967). The power granted under the Commerce Clause is vast, reaching even purely intrastate activities which merely "affect" interstate commerce. *See Hadel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276-77 (1981).

In *Allied Bruce-Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273 (1995), this Court had little difficulty finding that an arbitration agreement between a home owner and a pest control service had adequate interstate commerce nexus to bring the agreement under the FAA. Application of the FAA was evidenced by the pest control company's interstate operation and its use of raw materials purchased from out of state. *See id.* at 282.

Respondents cannot avoid review by claiming, for the first time, that the FAA is inapplicable to Ryan's efforts to compel arbitration of this dispute.

A Circuit Split Clearly Exists with Respect to the Application Of the Knowing and Voluntary Standard.

Following the Ninth Circuit,[1] the Sixth Circuit[2] below applied a knowing and voluntary waiver standard in reaching the conclusion Respondents had not adequately waived their right to a jury trial. Petitioner pointed to case law out of the Fifth and Eighth Circuits[3] where those courts declined to adopt this heightened standard as well as case law out of the First, Fourth and Seventh Circuits[4] which have acknowledged the split.

Respondents unconvincingly attempt to distinguish the aforementioned cases by stating that they address only the issue of whether an individual signing an arbitration agreement had knowingly and voluntarily waived their right to litigate federal statutory claims in court and did not specifically address waiver of the constitutional right to trial by jury. Respondents point to a distinction without difference; individuals foregoing their right to litigate federal

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[1] *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

[2] *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005).

[3] *See Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 183-84 n.2 (3d Cir. 1998); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997).

[4] *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 18-19 (1st Cir. 1999); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 n.2 (4th Cir. 1999); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997).

statutory claims by agreeing to arbitrate employment-related disputes are, by necessary implication, waiving their right to a jury trial on these issues.

Contrary to Respondents' erroneous assertion, there exists a demonstrable division among the circuits involving application of the knowing and voluntary waiver of the right to a jury trial standard when scrutinizing a pre-dispute arbitration agreement in the employment context. *Compare Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005) *with Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 306-07 (4th Cir. 2001) (rejecting application of a standard requiring the knowing and voluntary waiver of the right to a jury trial by party resisting arbitration); *see also Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) (recognizing the "loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate."). That split should be resolved by this Court.

CONCLUSION

Ryan's petition for writ of certiorari should be granted.

Respectfully submitted,

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